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NO. 94-375

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF CABOOL, MISSOURI and ALDERMEN JAY GENTRY AND JERRY ROBERTS,

Petitioners,

v.

JOHN C. CASEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Petitioners stand on their Statement of the Case, and do not respond to the factual inaccuracies in Respondents brief, except to respond seriatim to "the uncontradicted admissions" of petitioners, listed in the Brief in Opposition at pg. 22-24. Respondent's assertions [in brackets below] are contrary to the facts:

(a) [Respondent asserts: The conversation was private] Police Chief, Lynn Jones, overheard portions of the conversation. (T.V. 2, p. 143) See also pp. 4-5 infra

(b) [Respondent asserts: MacPherson was not Casey's supervisor] MacPherson was the managing head of city government. Casey had been specifically instructed to take complaints to his immediate supervisor Lynn Jones. (T.V. 1, p. 185-88) Casey knew going outside the chain of command was insubordination. (T.V. 1, p. 186)

(c) [Respondent asserts: MacPherson encouraged the conversation] MacPherson did not encourage the maliciously false attacks on the Mayor or the Stewarts. He was deeply upset by the agitated, confrontational and domineering, ranting and raving way they were presented. (T.V. 3, p. 210, 18) MacPherson felt Casey was trying to threaten, intimidate and blackmail him and the city into letting Casey dictate policy. (T.V. 3, p. 246) Casey, not MacPherson, wanted to continue the conversation when the 5:00 o'clock whistle blew (T.V. 3, p. 242), and it was MacPherson who halted the conversation. (T.V. 3, p.213).

(d & h) [Respondent asserts: Casey was fired solely for protected speech] Casey was not and would not have been fired just for presenting his views. (T.V. 3, p. 207). MacPherson knew of Casey's views on such matters; Casey had twice before presented them to him. (T.V. 3, p. 202-03, 206). Rather it was the disruptive, malicious, and false accusations against the Mayor, the City Clerk and her son that upset MacPherson. (T.V. 3, p. 210-11) But MacPherson would have recommended termination (T.V. 4, p. 26-27) and the Aldermen would have terminated Casey, disregarding the content of the May 3, statements, because of Casey's history of repeated problems. (T.V. 4, p. 107-08, 114-15)

(e) [Respondent asserts: Casey's job performance was exemplary] Casey was not an exemplary employee. Lynn Jones had problems with Casey's uneven scheduling of the dispatchers, his absenteeism, and his scheduling himself for more overtime. (T.V. 2, p. 151) Tension existed between Lynn Jones' department and the City Clerk's office because Casey did not fill out and turn in his time cards as directed. (T.V. 2, p. 207-08). Casey failed to get his time cards in on time and other times would fill them out in advance, before he worked the time shown. (T.V. 2, p. 207-08, T.V. 3, n. 33)

Casey had been delinquent in paying debts he owed the city, specifically tax bills, and certain bills for improvements to his property (T.V. 3, p. 198, 219, 236), under the Cabool City Code, grounds for discipline or termination. (T.V. 4, p. 26) (Def. Tr. Ex. 27) Casey continuously stirred up trouble in other departments to the point he was ordered

and he agreed to stay out of their business. (Def. Tr. Ex 20) Casey had a hard time getting along with the City Administration, and did not want to follow orders. (T.V. 3, p. 38). Casey also tried to direct the work of other City employees without authority to do so. (T.V. 3, p. 96-98, T.V. 4, p. 35).

While Fire Chief, Casey broke the lock on a City door, at a fire department meeting, to obtain supplies for the fire department, although the supplies belonged to the City not the fire department. (T.V. 2, p. 225, 242, 255) He also took the lead fire truck outside the City (T.V. 2, p. 256; T.V. 3, p. 70, 260) Casey had been told not to leave the dispatcher's post to go to fires, and he understood that directive. (T.V. 1, p. 122-23), 129, 130; Def. Tr. Ex. 5) Casey admitted that he had left his dispatcher's post to go to fires. (T.V. 1, p. 131 - 132).

(g) [Respondent asserts: Defendant's believed the statements were of public concern] Certain witnesses testified Casey's statements would have been of public interest. But that does not make them "public concern" and protected speech as a matter of law. (See infra p. 5-6)

ARGUMENT

I. Respondent Was Not Discharged For Presenting His Views On Matters Of Public Concern And This Court Should Grant The Writ To Consider Whether The Speech Should Have Been Segmented And Whether Certain Segments Were Unprotected Speech.

Defendant's reliance on Germann v. City of Kansas City 776 F2d 761, 764 (8th Cir. 1985)

is misplaced. Consideration of the six factors in Germann seriatim shows, Casey's false accusations were unprotected speech:

1. Need for Harmony. Cabool is a small community. The need for harmony in City government is seen by the lengths the various administrations had gone to keep Casey from stirring up trouble and meddling. Casey's accusations disrupted the Clerk's office. (T.V. 2, p. 284)

2. Whether Casey's Speech Caused Working Relations to Deteriorate. MacPherson was upset by the intimidatory and extortionate attempts by Casey. (T.V. 3, p. 210-11) (T.V. 2, p. 279) Billie Steward testified that what Casey said made her sick. (T.V. 2, p. 279) The false statements upset Mayor Hardy (T.V. 3, p. 109) and contributed to Brian Stewart resigning from the volunteer fire department (T.V. 2, p. 246). The Police Department was paid through the Clerk's office and the police dispatchers answered their phone after hours and on weekends. The statements caused disruption in the Clerk's office. (T.V. 2, p. 284) It is hard to imagine statements that could have been more disruptive.

3. Time Manner and Place of the Speech. Lynn Jones testified that he walked into the police department, with others, during the second portion of the conversation, and heard enough to realize the conversation was tense and anxiety ridden. (T.V. 2, p. 143) Jones told Stewart he overheard part of the exchange. (T.V. 3, p. 31)

Respondent in his brief in opposition blames MacPherson for telling Billie Stewart about the accusations. But because of the

accusations it was necessary for MacPherson to investigate and thus Casey's malicious accusations could not be kept private. Casey admitted he had previously talked to his wife, the Mayor and other Aldermen about some of the matters. (T.V. 2, p. 16-17, T.V. 4, pp. 83-88) In short, the conversation was not one that should be characterized as or could have been expected to remain private.

4. Context. Casey was concerned about his personal insurance rates. (T.V. 1, p. 80-82) He was concerned about not being able to control and dictate fire department policy and operations. (T.V. 1, p. 79-80) He was trying to intimidate or blackmail MacPherson (T.V. 3, p. 245) If testimony of Whittaker and Jones is credited (T.V. 2, p. 140-42, T.V. 3, p. 75, 80), Casey planned to quit his job and was trying to get fired so he could sue the City. The context was clearly one of private, not public, concern. Casey's contention that his conversation with Mayor Hardy regarding Billie Stewart was related to his dispatching duties, (T.V. 4, p. 83-88, 97) forecloses his claim it was a matter of public concern under Thomson v. Scheid, 977 F.2d 1017, 1021 (6th Cir. 1992).

5. Degree of Public Interest in the Speech. There might be some public interest in Casey's maliciously false accusations. But considering Casey's intent, to intimidate MacPherson into letting Casey set fire department policy, the statements should be characterized as expressions of private grievances not public concern.

The courts below also disregarded the fact the accusations were knowingly false. See Gertz v. Robert Welch Inc., 418 U.S. 323, 340

(1974)("there is no constitutional value in false statements of fact"); American Postal Workers Union v. United States Postal Service, 830 F.2d 294, 306, 859 n. 27 (D.C. Cir. 1987); Brasslett v. Cota, 761 F.2d 827, 839 (1st Cir. 1985)("an employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods"). In Sharpe v. Long, 8 IER Cases 798 (D.S.C. 1992), the court said, just because others mights be interested or even affected by "whistle blowing" doe not elevate a personal grievance to the level of "a matter of public concern."

6. Interference with Ability to Perform Job. The statements may have had no effect on Casey's technical abilities to perform his duties, but they created tension with other departments and evidenced his failure to follow orders and the chain of command. (T.V. 1, pp. 185-88, T.V. 2, p. 16-17) The accusations caused MacPherson, after an investigation revealed they were false, and then the Board, to evaluate Casey's performance and value as an employee.

Kelley v. Johnson, 425 U.S. 238, 246-47 (1976), Janusaitis v. Middlebury Volunteer Fire Dept., 607 F.2d 17(2d Cir. 1979), and the esprit de corps arguments are valid here, as Casey was a part of the Police Department, paid under the Police Department budget. (T.V. 2, p. 137, 205, 274-76) The Police Chief, Lynn Jones was specifically made his immediate supervisor. (T.V. 1, p. 88, 185, T.V. 2, p. 143-44) The fact Casey was a police dispatcher, does not negate the recognized significant government interest in regulating the speech of department employees

"to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution." Hughes v. Whitmer supra, 714 F.2d at 1419.

The instant case is stronger than Churchill v. Walters, 128 L.Ed 686 (1994) in that Casey made maliciously false accusations about several individuals, including city officials, he had a history of interfering, a chain of command had been set up which he disregarded, and Casey was given a formal post-termination hearing.

In fine, Petitioners did not, have not, and will not ever admit, as Respondent reports, (Brief in Opposition p. IV, 24) "that the entire conversation was public concern." Petitioners have steadfastly contended at trial and on appeal that the maliciously false accusations against the Mayor and the Stewarts were not protected speech under the Pickering balancing test, and that the courts below erred in refusing to segment those portions. (See Appellant's 8th Cir. brief pp. 20-27)

II. This Is An Appropriate Case To Resolve The Acknowledged Split In The Circuit's On The Issue Of Whether Speech Must Be Considered As A Whole Or Segmented, And The Court Should Grant The Writ To Consider Whether The Speech Here Should Have Been Segmented.

The Courts' failure below to segment the speech, places the case on the side of the Seventh Circuit and Second Circuit and in opposition to the Fifth Circuit and the Eighth Circuit decision in Shands v. Kennett,

993 F.2d 1337 (8th Cir. 1993). See Saulpaugh v. Monroe Community Hospital, 11 F.3d 134, 147 (2d. Cir. 1993).

III. The Court Should Take The Case Because The Eighth Circuit Failed To Even Consider Petitioner's Res Judicata Argument.

Casey was notified of the termination by letter of May 8, 1990, and placed on paid leave pending appeal. (T.V. 1, p. 109, Casey depo, Ex. 15, App. 104) Casey requested an appeal by letter (Def. Tr. Ex. 15). A public hearing, pursuant to City ordinances, was scheduled and held on June 7, 1990 (T.V. 3, p. 225, 229)(Def. Tr. Ex. 16)

As in a contested case, Respondent was represented by an attorney and allowed to present evidence and testimony, there was cross-examination and recording or testimony. (Def. Tr. Ex. 13) The witnesses were sworn. (T.V. 4, p. 46) Mayor Pro Tem Don Wells, who had not participated in the termination, was appointed to preside at the public post termination hearing (Def. Tr. Ex. 16). Following the hearing, Wells issued a written decision recommending John Casey's termination be affirmed (App. 107-08)(Add. 45) The constitutional claim had been raised by Casey's attorney Peggy Hedrick, at the post-termination hearing when she argued:

> And if you fire somebody for saying things who is in one of these jobs whose job performance is adequate, you're violating First Amendment right. And I believe that the City of Cabool violated John Casey's First Amendment right. (Def. Tr. Ex. 13 at p. 85-86).

The administrative hearing was certainly a contested case within the meaning of Hagely v. Board of Educ., 841 S.W.2d 663, 667-69 (Mo 1992. Under Missouri law, that action was subject to judicial review under Chapter 536 of the Missouri Revised Statutes.

Casey's reliance on Kish v. Chilhowee R-IV School Dist, 814 S.W.2d 649 (Mo. App. 1991) is misplaced. In Kish the court held that where an administrative hearing is sought and obtained, which was done in the instant case, but not in Kish, the Plaintiff is not entitled to initiate a new suit. Rather, there is a right of review to the state circuit court pursuant to 536.110 RSMo. Kish, 814 S.W.2d at 654.

In Kish, the court held that unlike a tenured teacher who must exhaust administrative remedies, a superintendent is not governed by the Teacher Tenure Act and need not pursue the administrative process first. Kish chose not to go through the administrative procedure, there was no hearing, and thus no hearing record. Casey elected to go through the hearing and presented his claims and lost. Kish was not afforded any of the rights she would have been entitled to as a principal under the Tenure Act, i.e., the notice and hearing. 814 S.W.2d at 651. By contrast, Casey was afforded his rights under the Cabool Municipal Code. He was given notice, and a hearing. In Kish the Tenure Act and the APA were held inapplicable; there was no requirement that administrative remedies be exhausted, because none existed.

Unlike many other jurisdictions, in

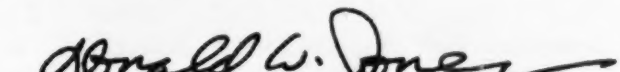
Missouri municipal hearings, such as the post-termination hearing here, are governed by the APA and other Missouri Statutes and given the same legal consequences as any other administrative hearing. Casey did pursue his administrative hearing but then abandoned his right to review by the circuit court. Casey failed to exhaust the state procedures available to him under 536.100 and 536.110 RSMo. (Included in Appendix to Petition for Certiorari) See, Wintercreek Apartments v. St. Peters, 682 F. Supp. 989 (E.D. Mo. 1988); Lewis V. Roskin, 823 S.W.2d 152 (Mo. App. 1992).

IV. Farrar v. Hobby, 121 L. Ed.2d 494, 505-06 (1992) Is Applicable.

Justice Thomas' opinion for the Court talked about not just nominal success but also partial and limited success, which is exactly the case here where Casey sought $200,000 in damages asked the jury for over $65,000 in lost wages and benefits and recovered less than $20,000. (See App. 4-8, T.V. 5, p. 25, App. 189)

CONCLUSION

The need for plenary review is indisputable, indeed petitioners request the Court reverse now.



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